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"The Current State of the Responsible Corporate Officer Doctrine: What a Corporate Officer of Other Responsible Official Needs to Know about Environmental Criminal Liability"
By: Maj Joseph Cole

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PAT WAGNER,
Public Affairs Specialist

The Current State of the Responsible Corporate Officer Doctrine: What a Corporate Officer or Other Responsible Official Needs to Know about Environmental Criminal Liability

By

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"The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government"

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Table of Contents

I. Introduction

To what extent are corporate executives criminally liable for actions occurring, or decisions made during their tenure as officers or directors of a corporation? As the nature of modern business involves complex interconnected relationships between subsidiaries, partnerships, and other entities, the question is more one of how insulated can a corporate officer be from the criminal actions that occur during the stewardship of the corporate officer acting on behalf of the corporation. One need only look to the apparent collapse of the Enron Corporation as the bellwether of public sentiment in favor of individual criminal liability for corporate officers in such scenarios.[1] Questions relating to how much the corporate officer knew about any criminal wrongdoing are central to a reasoned approach at trying to attach culpability to an executive. However, is it any less rational to associate responsibility with leadership or the wherewithal and access to information such that the officer or director should have known better or should have acted differently?

The individual liability of corporate officers for environmental crimes is known as the Responsible Corporate Officer (RCO) doctrine. While individual criminal liability for corporate officials is not a new concept in the field of environmental law,[2] the application of the RCO doctrine remains an unsettled area of law. Despite this, the doctrine has enjoyed a long, yet somewhat tumultuous life in American jurisprudence. Due to the effect the doctrine has on the analysis of criminal intent for individual liability, it has been the source of much debate and strong opinions.[3] While the roots of the RCO doctrine are firmly planted in a

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[1] Clifton Leaf, *White Collar Criminals: They Lie, They Cheat, They Steal, and They've been Getting Away with it for Too Long*, FORTUNE, March 18, 2002.

[2] Decided in 1943, *United States v. Dotterweich* is regarded as the earliest application of the Responsible Corporate Officer Doctrine. *See* United States v. Dotterweich, 320 U.S. 277 (1943).

[3] *See* Joshua Safran Reed, *Reconciling Environmental Liability Standards after Iverson and Bestfoods*, 27 ECOLOGY L.Q. 673 (2000); Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 TOXICS L. REP. 1378 (1992); Ronald M. Broudy, Note, *RCRA and the Responsible Corporate Officer*

policy-based balancing of responsibilities and risk of harm, the resultant use of the doctrine conflicts with standard concepts of intent and criminal liability.

This paper will address liability under the environmental statutes, basic principles of corporate and officer liability principles, the genesis of the RCO doctrine, its impact on the litigation of environmental crimes, and the current state of the doctrine. To ascribe liability to a responsible corporate officer under an environmental criminal statute, there is usually required some relation between the actions of the officer (usually authority to control) and a failure to prevent misconduct from occurring. It is only through a review of the knowledge requirements in environmental criminal statutes and the interplay of those statutes and public welfare offense concepts that the responsible corporate officer doctrine can be analyzed in the complicated milieu that is environmental criminal law.

II. Fundamental Criminal Elements and the *Mens Rea*[4] Requirement

A fundamental principle of American criminal law is the determination of whether or not the accused has committed a prohibited act (*actus reus*), and if so, was the act committed with a guilty mind (*mens rea*). Typically, criminal statutes contain words of criminality to delineate the criminal intent required for the commission of the offense. That is, words such as "intentionally," "knowingly," and "willfully" are used to describe the *mens rea* required for the crime. As the Supreme Court has observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[5]

Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement, 80 KY. L. J. 1055 (1991-1992).

[4] *Mens rea*, criminal intent, and *scienter* are used to describe the state of mind that usually must be shown to prove criminal conduct. *See* WAYNE R. LAFAVE, CRIMINAL LAW, 224 (3rd Ed. 2000).

[5] United States v. United States Gypsum, 438 U.S. 432, 436 (1978).

The following are fundamental criminal law concepts related to the determination of the *mens rea* requirement in criminal law.

A. *Actus Reus*. Before determining the *mens rea* involved in the commission of a crime, it must be found that at issue is a criminal act involving criminal conduct or the commission of a prohibited act.[6] While it is often central to a finding of culpability that the individual's actions have resulted in the finding of criminal liability, there are other means of determining responsibility.

1. Omission to Act. The imposition of criminal liability may arise where an individual fails to perform a required act. The basis for such liability derives from the common law notion of a duty to act. However, a person generally does not have a legal duty to act. The following are examples of conditions giving rise to a duty to act: a duty based on relationship, a contract, and most importantly from the environmental perspective, a duty based upon statute.[7] An example of an environmental statute creating a duty to act is found in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[8] by a requirement that makes the failure to make a report as required by the statute an offense.[9]

2. Vicarious Liability. Vicarious liability occurs "where the defendant, generally one conducting a business, is made liable, though without personal fault for the bad conduct of someone else, generally his employee."[10] Contrary to strict liability which dispenses with the need for proving *mens rea*, vicarious liability does away with "personal

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[6] LAFAVE, *supra* note 4, at 214.
[7] *See Id.* at 215-219.
[8] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1988), Codifying Pub.L. No. 96-5610, 94 Stat. 2767 (1980) as amended.
[9] *See* 42 U.S.C. § 6603(b).
[10] *See* LAFAVE, *supra* note 4, at 265.

actus reus."[11] The vicarious liability of corporate officers for acts of subordinates or agents will be discussed below.

B. *Mens Rea*. There are differing approaches to determining the level of criminality exhibited by the alleged criminal to complete the commission of the crime. That is, what was the extent of the guiltiness of his state of mind? Generally, these approaches can be separated into four categories of crimes; (1) those that require the intent to commit the act or bring about the result; (2) those requiring knowledge of the act; (3) those requiring recklessness or disregard in taking an action or causing its result; and (4) those requiring negligence in taking the action or causing the result. In addition, a crime may be one of strict liability, requiring no determination of the criminal's state of mind.[12] It is important to pay particular attention to the language of the environmental statute as well as the legislative intent evinced by Congress as to what the knowledge requirement is for culpability in the criminal activity.[13] As will be seen, this is not a simple task.

C. Scope of the Requirement of Knowledge. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."[14] This fundamental notion lies at the heart of how society determines what behavior will be punished as criminal, and the mental state required in the commission of the act to be held criminally culpable. That culpability is a recognition of the moral stigma society attributes to the sanctions appropriate to punish the wrongdoer for the prohibited acts; "there also usually needs to be some concrete harm with a public dimension that is realized or threatened as a

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[11] *Id.*

[12] The Rivers and Harbors Act of 1899 for example has such a standard of strict liability for actions relating to discharges of refuse into the navigable waters of the United States and for any action that inhibits the navigability of those waters.

[13] DONALD A. CARR ET AL., ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS, 128 (1995).

[14] 342 U.S. 246, 256 (1952).

direct result."[15] The law provides for an expectation of notice that certain conduct is prohibited; "[w]ere it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[16] Nonetheless, it is also equally fundamental to our common law jurisprudence that ignorance of the law is no excuse. Due process requires there be appropriate knowledge of the criminal nature of an individual's act before one can be held liable for violation of that sanction; depending upon the crime involved, the level of culpability is determined by the "wrongful purpose"[17] of the criminal actor. As stated above, criminal statutes can require different levels of scienter on the part of the criminal defendant. For purposes of this paper, the emphasis will be on the requirement that a criminal defendant must have the *mens rea* that an act was committed "knowingly" since that is most often the standard of wrongful purpose required in environmental statutes.[18]

D. Willful Blindness. "Willfull blindness" is a well-known evidentiary principle involving the concept of transferred intent. The doctrine allows the factfinder to infer knowledge from proof that a defendant shielded himself from knowledge of an illegal act.[19] Deliberately remaining ignorant of facts that are otherwise apparent creates an inference that the defendant avoided the facts because of knowledge of the wrongfulness of the conduct.[20] In addition, proof of knowledge can arise when a person "has notice of facts which would put

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[15] Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law,* 83 GEO. L.J. 2407, 2443 (1995).
[16] Lambert v. California, 355 U.S. 225 (1957).
[17] Ratzlaf v. United States, 510 U.S. 135 (1994), 142 114 S. Ct. 655, 126 L. Ed. 2d 615, quoting Liparota v. United States, 471 U.S. 419, 426, 85 L. Ed. 2d 434, 105 S. Ct. 2094 (1985).
[18] *See* ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT, 578 (2001). *See also* 42 U.S.C. § 7413(c); 42 U.S.C. § 6928(d)&(e); 42 U.S.C. § 9603(b)&(d); 7 U.S.C. § 136*l*(b)(ii); 15 U.S.C. §§ 2614-1615; 33 U.S.C. § 1319(c). The Toxic Substances Control Act is the only environmental statute containing a general criminal provision requiring proof that an act was committed "knowingly or willfully." *See* 15 U.S.C. § 15(b).
[19] *See* LAFAVE, *supra* note 4, at 219.

one on inquiry as to the existence of that fact, when he has information to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed."[21] Under the willful blindness doctrine, a defendant's actual knowledge or conscious avoidance are treated the same; proof of either one may meet the knowledge requirement in a criminal offense. As used in a case analyzing the responsible corporate officer doctrine, the court found that "knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions."[22] The court went on to state that "willful blindness to the facts constituting the offense may be sufficient to establish knowledge."[23]

E. Derivative Liability. Another fundamental element of criminal law that applies to criminal liability of corporate officers for the illegal acts of another is the treatment as an aider or abettor under the derivative approach to liability.[24] When a corporation commits an offense, it is the principal. However while a corporation may commit the offense, the individual who aids and abets the commission of the offense is equally guilty if the person is in a position of authority and failed to exercise that authority to remedy the violation. When applied to strict liability offenses, the derivative approach treats the aider and abettor as standing "in the shoes of the principal," thereby obviating the need for a culpable mental

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[20] *See* Barry M. Hartman & Charles A. De Monaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ELR 10,145 (1993).
[21] *See* LAFAVE, *supra* note 4, at 220.
[22] United States v. MacDonald & Watson Waste Oil, 933 F.2d 35, 55 (1st Cir. 1991). *See also* United States v. Hopkins, 53 F.3d 533 (2nd Cir. 1995).
[23] *See MacDonald*, 933 F.2d at 55.
[24] "Under this approach, the mental state for the aider and abettor is the same as that for the principal. The mental state for the aider and abettor is not a constant, but varies with the crime. It may be purposeful intent, if, under the particular crime charged, the principal is not guilty unless acting with purposeful intent. It may be knowledge, bad purpose, or strict liability; for each offense, the aider and abettor's mental state is derived from that required of the principal." *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 FORDHAM L. REV. 1341, 1410 (2002).

state on the part of the corporate official. Although not usually treated as derivative law cases,[25] the strict liability public welfare cases that serve as the genesis for the development of the RCO doctrine plainly apply derivative law concepts to public welfare cases.[26]

III. Criminal Liability of Corporations and Corporate Officers

A. Development of Corporate Criminal Liability

Early commentators on the common law have recognized that the corporation has enjoyed special treatment under the law.[27] The limited personal liability that goes hand-in-hand with the corporate structure is the most important reason why the corporation is chosen as the business organization of choice for the majority of commercial business activity. By creating a legal entity to be responsible for the actions of the business organization, the individual investor owners of the corporation generally can escape personal liability for corporate activities.[28] Originally, "a corporation could not be criminally culpable, because it possessed no cognitive ability and therefore could not form the *mens rea* traditionally required for a conviction."[29]

This concept was rejected by the United States Supreme Court in *New York Central & Hudson River Railroad v. United States.*[30] In *New York Central*, the railroad company was

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[25] *See id.*
[26] *See id.* at 1418-1423.
[27] "[A] corporation may not commit treason, or felony, or other crime in its corporate capacity[.]" Keith Welks, *Corporate Criminal Culpability: An Idea Whose Time Keeps Coming*, 16 COLUM. J. ENVT'L. L. 293 (1991), quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 476 (W. Lewis, ed. 1922).
[28] "Basic to the theory of corporation law is the concept that a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute of the separate corporate personality enables the corporation's stockholders to limit their personal liability . . . The corporate form, however, is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation." Lynda J. Oswald and Cindy A. Schipani, *Legal Theory: CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U.L. REV. 259 (1992), citing Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973).
[29] *See* Welks *supra* note 27, at 294.
[30] 212 U.S. 481 (1909).

found to have violated the Elkins Act[31] by paying shippers a rebate for using the railroad line. The Act held the corporation criminally liable for the criminal acts committed by corporate directors, officers, or any other acting on behalf of the corporation. Even though no evidenced was produced showing the directors had authorized or approved the prohibited rebates, the corporation was found criminally responsible. Relying on a tort law doctrine, the Court found that accountability for the acts of the corporation's agents was based on the imputed benefit received by the corporate principal from the acts of the agent; "justice requires that the [principal] be held responsible."[32]

B. Traditional Concepts of Corporate Liability

A corporation, as a principal, generally is bound by the acts of the corporation's agents. The venerable legal axiom of *respondeat superior* tells that, absent actions on the part of the agent, be that agent corporate officer or employee, that step outside the scope of his employment, the corporation may incur liability in civil law for the acts of its' agents.[33] In another approach to corporate liability, the illegal actions of a corporation generally are not attributed to the corporation unless the acts go beyond the power of the corporation as set out in its by-laws or charter. Finally, another avenue of corporate liability is via the concept of "piercing the veil" of the corporation.[34] This approach is used to go beyond the corporate form to extend liability for wrongful acts of a corporation to the parent corporation in the case of misconduct by a subsidiary acting as the "alter ego" of the parent, or to officers,

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[31] Pub. L. No. 57-103, 32 Stat. 847 (1903).
[32] New York Central, 212 U.S. at 493.
[33] "Respondeat superior" is a traditional tort law doctrine that can be defined as "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7th Ed. 1999).
[34] "Piercing the corporate veil" is defined as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." BLACK'S LAW DICTIONARY 1168 (7th Ed. 1999). The concept of piercing the corporate veil also is traditionally used to find a

directors, and even individual shareholders. Although typically used in civil cases, a court has used the concept to impose criminal liability on a parent corporation for the acts of a subsidiary.[35]

C. Traditional Doctrine of Corporate Officer Liability

Corporate officers are criminally liable for the acts they personally commit, for the acts of agents or subordinates, for crimes that they aid or abet, and for crimes they fail to prevent despite the ability and authority to control.[36] The first category of liability is based on the concept that the corporate officer cannot use the corporate shield to protect himself from responsibility for criminal wrongdoing. The next category arises due to the actions of a corporate official in giving aid, counsel, or instructions to another involved in the commission of a criminal act. "The definition of aiding and abetting requires knowledge of the criminal act and some participation in bringing it to completion. Instructing or authorizing another to commit an offense is all that is required to impose liability."[37] The final category is the idea of a "responsible share;" as will be discussed below, this concept, arising out of the *United States v. Dotterweich,*[38] attaches liability to all (including corporate officials) who have a responsible share in the furtherance of a criminal act prohibited by statute. Due to the potential risk of harm involved by violation of a statute, a corporate official in a position of "responsible relation" to the danger and who could be informed of the danger is thereby responsible for the violation of the statute when it occurs.[39]

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parent corporation responsible for the acts of a subsidiary when "the corporate form would otherwise be misused to accomplish wrongful purposes . . ." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

[35] *See* United States v. Exxon Corp. & Exxon Shipping Co., Crim. No. A-90-015-Cr. (D. Alaska 1990).

[36] *See generally* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS, 254 (6th Ed. 1998).

[37] *Id.* at 255.

[38] 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).

[39] *Id.* at 285.

It is this concept of liability for offenses arising under the doctrine of a public welfare offense that will be discussed next. This foundational approach to liability is the basis upon which the RCO doctrine lies.

IV. Public Welfare Offense Doctrine

A. Public Welfare Offenses

When a statute merely codifies the common law, courts often assume there is a *scienter* requirement even if the level of culpability has not been addressed,[40] but for statutes concerned with public health, safety, and welfare, courts have taken a different view. Generally, a public welfare statute without a standard for culpability will require the government to only prove the defendant had the responsibility and had either the authority to prevent or the ability to remedy a violation; the government does not have to show that the individual had the intent to violate the law or even any knowledge of the violation.[41] The Supreme Court defined a public welfare statute as one that makes criminal an act that a "reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[42] The following cases are frequently cited when addressing the application of public welfare offense principles to the knowledge requirement of environmental statutes.

1. *United States v. International Minerals & Chemical Corp.*

The seminal case addressing the application of the public welfare offense doctrine to a situation similar to that involved in environmental statues is *United States v. International*

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[40] Staples v. United States, 511 U.S. 600, 616 (1994).
[41] *See Dotterweich,* 320 U.S. 277; United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. Park, 421 U.S. 658 (1975).
[42] Liparota v. United States, 471 U.S. 419, 433 (1985).

Minerals & Chemical Corp.[43] In this case, the defendant was charged with shipping hazardous materials in interstate commerce and knowingly failing to show that the materials were properly identified as such in accordance with Department of Transportation regulations.[44] The corporation was charged with violating 18 U.S.C. § 834(f) for "knowingly violating any such regulation," in reference to a regulation created for the purpose of safe transportation of corrosive liquids.[45] Interpreting the meaning of "knowingly violates any such regulation," the Court held the statute was a "shorthand designation" for knowingly committing the acts that violate the Act.[46]

The Supreme Court, quoting from *Morissette v. United States*, a leading public welfare case, recognized the importance of criminal intent when it stated, "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[47] Yet in *International Minerals*, the Court explained that when dangerous products or "obnoxious" waste materials are the regulated activity, the likelihood of regulation is so great that anyone involved in the activity is presumed to be aware of the regulatory requirement.[48] The government therefore was not required to prove the accused intended the prohibited result of his actions, nor was the defendant allowed to use its ignorance of the law as a defense.[49]

2. *Liparota v. United States*

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[43] 402 U.S. 558 (1971).
[44] *Id.* at 558.
[45] *Id.* at 559.
[46] *Id.* at 562.
[47] *Morissette*, 342 U.S. at 256.
[48] International Minerals, 402 U.S. at 563-564.
[49] *Id.*

Another often-cited case in the discussion of the application of the public welfare offense doctrine to environmental cases is *Liparota v. United States*.[50] In this case, a restaurant owner was convicted under 7 U.S.C. § 2024(b)(a) for unlawfully acquiring and possessing food stamps for less than the face value of the stamps.[51] The statute imposed liability on "whoever knowingly uses, transfers, acquires, alters, or possess [food stamps] in any manner not authorized by [the statute] or the regulations."[52] At trial, the trial judge instructed the jury that the government had to prove the defendant acquired and possessed the food stamps in a manner not authorized by the statute or regulations and the defendant did so knowingly and willfully. The government's position was the statute was violated if the defendant knew that he acquired or possessed the food stamps in an unauthorized manner; proof of the defendant's *mens rea* was not required by the statute to show a violation.

The Supreme Court held that to prove a violation of the statute, the defendant had to know that his acquisition or possession of the food stamps was somehow contrary to law or regulation. In its review of the knowledge necessary for conviction, the Court looked first to Congress' intent in the statute. After finding that Congressional intent was unclear as to the knowledge required by the statute, the Court then relied on *Morissette* and the contention that it is fundamental to universal systems of law that before treating an act as criminal that there be a requirement of intention.[53] The Court determined that innocent conduct would be criminalized if proof of knowledge of the unauthorized nature of the defendant's acts was not required. Concluding that although the statute did not provide a mistake of law defense, there was nothing in the legislative history to indicate that Congress intended the result urged

[50] 471 U.S. 419 (1985).
[51] *Id.* at 420.
[52] *Id.* at 420, n.1.
[53] *Id.* at 432.

by the government.[54] The Court distinguished the food stamp offenses at issue in this case from the definition of a public welfare offense in which the Court would accept that there is no *mens rea* required; this conduct was not such that a reasonable person should know it is subject to a stringent public regulation due to the threat to health or safety.[55]

It is difficult to reconcile the Court's holdings in *International Minerals* and *Liparota* considering that congressional intent as to the knowledge requirement of environmental statutes has been also unclear. The result is the "patchwork quilt" approach taken by the circuits when analyzing the required proof of knowledge in environmental statutes and the subsequent confusingly dissimilar treatment of environmental statutes as public welfare statutes.[56]

3. *Staples v. United States*

An illustrative example of the Supreme Court's emphasis on the narrowness of the public welfare statute exception for the *mens rea* that must be proven in such a statute is *Staples v. United States*.[57] In this case, the defendant was charged with violating a felony provision of the National Firearms Act[58] by possessing an unregistered machine gun. During the execution of a search warrant of his home, the defendant was found in possession of a weapon that had been modified to have the ability to fire more than one shot with a single pull of the trigger, hence it was considered a machine gun under the statute.[59] At trial, the defendant argued that he had no knowledge of the weapon's automatic firing capability and therefore was not criminally liable. Despite the defendant's request, the trial judge declined to instruct the jury that the government must prove the defendant knew the gun would fire

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[54] *Id.*
[55] *Id.* at 433.
[56] *See* CARR, ET AL., *supra* note 13, at 186.
[57] 511 U.S. 600 (1994).

automatically. The defendant was found guilty and sentenced to probation for five years and a $5,000 fine.[60]

The Supreme Court held the government must prove actual knowledge on the part of the defendant of the characteristics of the weapon that brought it within the scope of the statute. Since the National Firearms Act was silent regarding *mens rea*, the government argued the knowledge requirement was presumed because this was a public welfare offense. As such, the purpose of the statute was to restrict the circulation of dangerous weapons; since guns are highly dangerous, individuals who possess them should be aware of the likelihood of regulation. The Court, in discussing public welfare statutes, stated, "we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense" to mean that the statutes "do not require the defendant to know the facts that make his conduct illegal."[61] The Court rejected the government's argument and limited its holding narrowly, indicating that its "reasoning depends upon a common sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may have in dealing with the regulated items."[62] The Court went to great lengths to distinguish this holding from its decision in *United States v. Freed*[63] where a violation of the same section of the National Firearms Act involving possession of a hand grenade was treated as a public welfare offense. The Court in *Staples* concluded that innocent gun ownership is commonplace, whereas an individual in possession of grenades is aware of their dangerous properties.

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[58] 26 U.S.C. §§ 5801-5872.
[59] *Staples*, 511 U.S. at 603.
[60] *Id.* at 601.
[61] *Id.* at 606.
[62] *Id.* at 620.
[63] 401 U.S. 601 (1971).

While the Court commented that previous Supreme Court decisions "suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense,"[64] it refrained from stating that it was inappropriate to consider that public welfare offenses may not be punished as felonies.[65] The Court determined that "such a definitive rule of construction" did not need to be adopted to decide in this case.[66]

4. *United States v. X-Citement Video, Inc.*

In *United States v. X-Citement Video, Inc.*[67], the Supreme Court confronted the issue of whether a statute that makes "knowingly" transporting, receiving, shipping and distributing sexual explicit conduct involving a minor child a federal crime, also requires knowledge that the material depicted a minor. The defendant was charged with violations of the Protection of Children Against Sexual Exploitation Act of 1977.[68] The Court addressed the issue of whether the term "knowingly" as used in the statute modifies only the verbs–transports, ships, receives, distributes or produces–or did it also apply to the subsections of the statue addressing the use of a minor. While the Court acknowledged that the most grammatical reading of the provision suggested that it only modified the surrounding verbs, the Court found that the "plain language reading of the statute was not so plain"[69] and held

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[64] *Staples*, 511 U.S. at 603.
[65] *Id.*
[66] *Id.*
[67] 513 U.S. 64 (1994).
[68] Specifically, the defendant was charged with violating 18 U.S.C. § 2252 which states in pertinent part:

> (a) Any person who—
> (1) knowingly transports or ships in interstate commerce or foreign commerce by any means including by computer or mails, any visual depiction, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . .
> (2) knowingly receives, or distributes, any visual depiction . . . or knowingly reproduces any visual depiction for distribution in interstate or foreign comers or through the mails, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .

[69] United States v. X-Citement Video, Inc., 513 U.S. at 69.

that the defendant must know the depiction was a minor engaged in sexually explicit conduct.

The Court again relied on the principle announced in *Morissette* recognizing the importance of a requirement of evil intent to sustain the finding of a crime.[70] To do otherwise, the Court opined, would allow the convictions of defendants who "had no idea they were even dealing with sexually explicit material."[71] The Court found the statute was not a public welfare offense because people "do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation."[72] In so holding, the Court, as it had in *Staples*, also considered the harsh penalties involved and how that tempered the application of the public welfare doctrine. The Court then followed *Staples* in favor of a scienter requirement applying "knowingly" to every element of the statute.

B. Application to Environmental Statutes

Public welfare statutes impart strict liability standards or relaxed *mens rea* standards to criminal actions even if the individual defendant had no knowledge of the violation or intent to violate the law. The rationale is the accused, if he does not cause the violation, "usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[73] In the truest application of the public welfare statute, the criminal law principle of a requirement of *mens rea* is inapplicable.[74] The critical determinant in the analysis of public welfare statutes is the legislative intent of the statute; absent a design to omit any *mens rea* element, a criminal statute is generally presumed to require a showing of

[70] Morissette v. United States, 342 U.S. at 256.
[71] United States v. X-Citement Video, Inc., 513 U.S. at 69.
[72] *Id.* at 71.
[73] Morissette v. United States, 342 U.S. at 255-256.

criminal intent.[75] Yet, courts have traditionally found that the risk of harm to the public by not holding a party accountable for a hazardous activity outweighs the "conventional requirement for criminal conduct-awareness of some wrongdoing."[76] The following case demonstrates the treatment of environmental statutes as public welfare offenses and the Supreme Court's view of that issue.

United States v. Hanousek

The Supreme Court recently bypassed the opportunity to definitively address the question of applicability of a public welfare analysis to criminal violations of environmental statutes when it denied *certiorari* in *United States v. Hanousek.*[77] The defendant was roadmaster of a railroad and responsible "for every detail of the safe and efficient maintenance . . . of the entire railroad."[78] As roadmaster, the defendant was responsible for a rock quarrying project. During the course of that project, approximately 700 feet of a petroleum pipeline were left unprotected and were subsequently ruptured during the project.[79] The Ninth Circuit upheld the conviction of the defendant for negligently discharging oil into a navigable river in violation of CWA §§ 309(c)(2)(A) and 311(b)(3).[80]

On appeal, the defendant contended he should be held to a standard of criminal negligence rather than ordinary negligence. The court however, concluded that "Congress intended that a person who acts with ordinary negligence . . . may be subject to criminal penalties."[81] The court reasoned the criminal provisions of the CWA were public welfare

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[74] *Liparota*, 471 U.S. 419, 433 (1985).
[75] *See Staples*, 511 U.S. at 1797.
[76] United States v. Dotterweich, 320 U.S. 277, 280-281 (1943), (citing United States v. Balint, 258 U.S. 250 (1922).
[77] 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).
[78] *Id.* at 1119.
[79] *Id.*
[80] *Id.* at 1118.
[81] *Id.* at 1121.

legislation that supported the sanction of "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[82] While the Supreme Court denied *certiorari* on this issue, there were dissents to the denial. In Justice Thomas' dissent, joined by Justice O'Connor, he maintained that the Ninth Circuit's interpretation of the public welfare offense doctrine was too broad. In addressing the Court's application of the public welfare doctrine, he concluded that: "We have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually an criminal statute applicable to industrial activities . . . "[83] Regardless of what may have been a "well-reasoned plea for review of the scope and applicability of the public welfare offense doctrine,"[84] the Supreme Court let stand the Ninth Circuit's treatment of the CWA as a public welfare offense.

C. The Origin of the Responsible Corporate Officer Doctrine

Under traditional concepts of criminal law, the bases of individual criminal liability of a corporate official are "for crimes that they personally commit, for crimes they aid or abet and for crimes they fail to prevent by neglecting to control the misconduct of those subject to their control."[85] The final category of liability has been the vehicle for imposing criminal liability upon corporate officials through analysis of public welfare offenses under what the responsible corporate officer doctrine. Applying this doctrine, a corporate officer is personally criminally liable on the basis of his "responsible relation" to the criminal

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[82] *Id.*

[83] 528 U.S. 1102, 1105 (2000) (Thomas, J., dissenting).

[84] Randall S. Abate & Danya E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. ENVTL. L.J. 304, 338 (2001).

violation, despite any knowledge on his part of the illegal activity. A corporate officer who is directly or ultimately responsible for the management of the prohibited activity is held vicariously liable for the acts of a subordinate under *respondeat superior* principles.

The United States Supreme Court in *United States v. Dotterweich* first addressed the individual liability of a corporate officer under a public welfare statute.[86] Dotterweich, the president of a pharmaceutical company, was found guilty of shipping adulterated and misbranded goods in violation of the Food, Drug, and Cosmetic Act (FDCA).[87] The FDCA was enacted by Congress to expand its ability to prevent noxious articles from entering the commerce stream.[88] The Act was designed as a strict liability statute that dispensed with the typical requirement of awareness on the part of the wrongdoer; liability was imposed without regard to the criminal intent of the defendant.[89]

Dotterweich was responsible for the day-to-day supervision of the company. Despite no showing that he knew of or participated in the illegal conduct, he was convicted of this misdemeanor[90] offense despite his lack of knowledge. Dotterweich tried to argue that he could not personally be held liable because the corporation was the only "person" subject to prosecution under the statute. The Supreme Court disagreed and stated that the crime could be committed "by all who have a responsible share in the furtherance of the transaction which the statute outlaws."[91] By holding Dotterweich criminally liable despite his lack of knowledge about any illegal activity, the Supreme Court laid the foundation of the RCO

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[85] *See* KNEPPER & BAILEY, *supra* note 36.
[86] 320 U.S. 277 (1943).
[87] 21 U.S.C. § 301 *et seq.*
[88] *Dotterweich*, 320 U.S. at 280.
[89] *Id.* at 281.
[90] The distinction between misdemeanor and felony offenses is significant; so to is it significant in the application of the RCO doctrine according to some commentators. *See* Cynthia H. Finn, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U.L. REV. 543 (1996).

doctrine. The Court justified the result in this case by weighing the potential risk of harm upon an unsuspecting public against the hardship suffered by the corporate official who, although not intending to violate the statute, was in a position of "responsible relation" to the danger such that he could be informed of the danger before loosing it on consumers.[92]

The Supreme Court then further clarified the RCO doctrine in *United States v. Park.*[93] Again reviewing a criminal conviction applying a strict liability statute of the FDCA, the Court found the president and chief executive officer of a national grocery store chain responsible for misdemeanor violations related to the contamination of food stored at the company's warehouses.[94] On appeal, Park asserted that he could not be held personally responsible because he had delegated responsibility for warehouse sanitation to "dependable subordinates."[95] Despite the breadth of the corporate officer's responsibilities in managing a national corporation, and the fact that various functions were "assigned to individuals who, in turn, have staff and departments under them,"[96] the president was found responsible. The Court found a duty on "[t]hose corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."[97]

The government did not have to prove the officer committed a wrongful act; under the Court's reasoning, criminal liability in a public welfare statute such as the FDCA's did

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[91] 320 U.S. 277 at 284.
[92] *Id.* at 285.
[93] 421 U.S. 658 (1975).
[94] *Id.* at 661-662.
[95] *Id.* at 663-664.
[96] *Id.* at 663.
[97] *Id.* at 672.

not turn upon the corporate official's "awareness of wrongdoing."[98] The Court set out the proof needed for a showing of liability: "The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[99] It was the relation of the individual's position in the corporation and his responsibility to prevent the violation or promptly correct it that triggered liability. While these expectations of responsibility may raise high the burden on corporate officers, they are consistent with the public's expectations of someone in a position of authority over enterprises that may affect the health and safety of the public.[100]

There are several underlying issues that continue to impact the RCO doctrine in relation to a public welfare analysis and the application to environmental statutes. Included in this complicated mix is the specific *mens rea* requirement for the statue at issue, treatment of the environmental statute as a public welfare statute, the effect of treatment as a public welfare statute and the elimination or reduction of *mens rea*, and the application of public welfare analysis to felony statutes. Supreme Court cases following *Park*, to include *Staples* and *X-Citement Video*, while not addressing the issue of corporate officer liability, have generally strengthened the *mens rea* requirement, often requiring criminal culpability in statutes, which on their face, required none.[101]

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[98] *Id.* at 672-673.
[99] *Id.* at 673-674.
[100] *See id.* at 672.
[101] *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with the intent requirement"); Liparota v. United States, 471 U.S. 419, 425-426 (1985) (where defendant was convicted of unlawfully acquiring and possessing food stamps in an unauthorized manner, government must prove defendant knew that his acquisition and/or possession of the food stamps was unlawful); United States v. X-Citement Video, Inc., 115 S.Ct. 464, 468 (1994) (adopting presumption that *mens rea* requirement should

D. Environmental Statutes and the RCO Doctrine

From the *Dotterweich* and *Park* cases, the RCO doctrine applies to find individual criminal liability in situations where a corporate officer has authority over an operation that has violated statues protecting public welfare or safety. While there may be no dispute that environmental statutes have the purpose of protecting public welfare,[102] the application of the RCO doctrine to environmental enforcement actions has not been harmonious. The main concern related to the use of the doctrine focuses on the court's ability to imply a *mens rea* element based on the position or authority of the corporate officer. As stated above, unlike the strict liability misdemeanor statutes of the FDCA at issue in *Dotterweich* and *Park*, the environmental statutes include felony provisions that require proof of an accused's criminal knowledge. Regardless of this contention, the practice of treating environmental statutes as public welfare statutes has been prevalent for some time, and is not without historical antecedents.[103]

One of the earliest cases to apply the RCO doctrine in the prosecution of an environmental statute is *United States v. Johnson & Towers, Inc.*[104] In this case, two management employees of an industrial engine repair company were found to fit within the definition of a "person" so as to be potentially liable for criminal violations of RCRA § 3008(d)(2)(A) for treating, storing, or disposing of hazardous wastes without a permit. The district court found the defendants were not "persons" able to obtain a permit; therefore, they

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apply to every element of the crime that would otherwise criminalize innocent conduct); Posters 'N' Things, Ltd. v. United States, 114 S.Ct. 1747, 1753-1754 (1994) (despite absence of the term "knowingly" from the statute prohibiting interstate conveyance in plan to sell drugs, required proof that defendant knowingly made use of such a scheme).

[102] *See* Finn, *supra* note 90.

[103] "Public welfare offenses in the environmental law context originated under the Refuse Act of 1899. Environmental violations under the Act were treated as public welfare offenses, and the Act authorized the prosecution of individuals who had no specific knowledge of the allegedly criminal act." *See* Abate & Mancuso, *supra* note 84, at 314-315.

could not be prosecuted under RCRA's criminal provision.[105] Because the defendants "managed, supervised and directed a substantial portion of Johnson & Towers' operations," the court reversed the district court's dismissal of RCRA criminal violations and remanded the case. On appeal, the defendants argued the statute only contemplated that owners and operators are "persons" for purposes of RCRA liability because they are the only individuals with the ability to obtain a permit.[106] In addition, the defendants also asserted that Congress' amendments to the CWA and the CAA to add "responsible corporate officers" to the definition of person was an indication that the RCRA definition should not be given a common sense meaning. Otherwise, the amendment would not have been necessary because responsible corporate officers are persons in the common sense of the term.[107]

The Third Circuit ignored the meaning of "person" in the CAA and the CWA as those issues were not before the Court, but it acknowledged that the additional language regarding responsible corporate officers in the CAA and the CWA seemed to expand rather than limit liability.[108] After reviewing legislative history, the Court determined Congress intended to reach employees engaged in the treatment, storage, and disposal activities and "did not explicitly limit criminal liability to owners and operators."[109] The Third Circuit concluded, relying on *Dotterweich*, that "in RCRA, no less than in the Food and Drug Act, Congress endeavored to control hazards that, 'in the circumstances of modern industrialism, are largely beyond self-protection.'"[110] Despite then identifying the case as a public welfare offense not requiring proof of *mens rea*, the Court strayed somewhat from a "classic" public

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[104] 741 F.2d 662 (3d Cir. 1984).
[105] *Id.* at 665.
[106] *Id.* at 664.
[107] *Id.* at 665, n.3.
[108] *Id.*
[109] *Id.* at 667.
[110] *Id.* at 665 (quoting *Dotterweich*, 320 U.S. at 282).

welfare approach and instead opined that statute required knowledge to every element of the crime. However, the requisite knowledge could be inferred due to the "responsible positions" the employees had in the corporation.[111]

The next section reviews the environmental statues, the associated *mens rea* requirements for those statutes, and how those standards are integrated into the finding of criminal liability of officers under the RCO doctrine.

V. Mens Rea in Environmental Statutes

According to the Model Penal Code, "a person acts knowingly with respect to a material element of an offense when . . . the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct of that nature or that such circumstances exist."[112] A knowing violation does not require that the defendant was aware of a law and intentionally violated it; it is more concerned with being able to demonstrate that the defendant was aware of their conduct.[113] The particular knowledge requirement for a conviction under one of the environmental statutes is not easily determined. The majority view, such that it is, is that proof of specific intent to violate a regulatory requirement is not required; a knowing violation is proven by showing that the defendant intended to commit an act.[114] A review of the specific statutory offenses at issue[115] and an examination of the approaches taken in the circuit courts as to proof of knowledge will provide insight into the different methods of meeting the *mens rea* requirement in environmental statutes.

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[111] *Id.*
[112] Model Penal Code § 202(2)(b) (1962).
[113] *See* LAFAVE,, *supra* note 4, at 214.
[114] *See* REITZE, *supra* note 18, at 578.
[115] The primary laws review in this article are: Clean Air Act §§ 7401-7671q (1990), Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (1972); Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901–699k (1988);

A. Statutory Provisions of Environmental Statutes

As stated above, the main federal environmental statutes require proof of knowledge to meet the *scienter* requirements of their criminal provisions. For example, in the Clean Water Act (CWA),[116] it is a felony offense to knowingly violate a condition of a permit issued under the Act.[117] Likewise, this same conduct, knowing violation of a permit, is also an offense under the Clean Air Act (CAA).[118] In the Resource Conservation and Recovery Act (RCRA),[119] any person who knowingly transports any hazardous waste is subject to liability.[120] Finally, in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[121] it is a felony to knowingly fail to report the release of a hazardous substance.[122] A person is usually treated as acting "knowingly" when an act was committed "voluntarily and intentionally and not because of ignorance, mistake, accident or some other reason."[123] Due to the complexity of the environmental statutes and the disparate approaches among the circuit courts as to the level of proof necessary to prove a knowing violation, an understanding of the criminal components of the major environmental laws is important to comprehension of how the statutes apply to the RCO Doctrine.

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and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1988).

[116] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1972), Codifying Pub.L. No. 92-500, 86 Stat. 816 (1972) as amended. The FWPCA is generally referred to as the Clean Water Act.

[117] *Id.* at § 1319(c)(2).

[118] 42 U.S.C. § 7413(c) (1988).

[119] The Solid Waste Disposal Act, as amended by The Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901–699k (1988), Codifying Pub.L. No. 94-580, 90 Stat. 2795, 2796, as amended.

[120] *Id.* at § 6928(d)(1).

[121] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1988), Codifying Pub.L. No. 96-5610, 94 Stat. 2767 (1980) as amended.

[122] *Id.* at § 9603(b)(3). (As amended by The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. No. 99-499, § 109, 100 Stat. 1613, 1632-1633.)

[123] Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. CHI. L. J. 169 (1994) (quoting United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52 n.15 (1st Cir. 1991).

1. Clean Air Act.[124] The Clean Air Act (CAA) governs stationary and mobile sources of air pollution through a system of air quality standards implemented through state implementation plans that are enforced through emission limitations and permit requirements. Criminal penalties for violations of the Act are imposed by 42 U.S.C. § 7413(c). Under the criminal provisions of this statute, liability is dependent upon whether an individual fits within the definition of a "person."[125] As defined in the statute, a "responsible corporate officer"[126] meets the definition of a "person." The CAA makes criminal the unpermitted release of any hazardous pollutant into air by any person.[127] In addition, the CAA makes it criminal for a person to knowingly violate state implementation plans and to fail or refuse to comply with any compliance order of the EPA Administrator, the national emission standards for hazardous air pollutants, or other requirements under the Act. It is also a criminal violation for any person to (1) knowingly make a false statement in a document filed, maintained, or used for purposes of compliance with the Act; or (2) knowingly falsify, tamper with, or render inaccurate an monitoring device or method required to be maintained under the Act.[128] Finally, the CAA provides criminal sanctions for violators who either knowingly or negligently release hazardous air pollutants when such a release puts others in imminent danger of death or serious bodily injury.[129]

2. Clean Water Act. The Clean Water Act (CWA) generally regulates the discharge of pollutants into the waters of the United States or into municipal wastewater treatment systems. The statute also is responsible for the protection of wetlands. Like the CAA, a permit system serves as the main regulatory enforcement mechanism of the CWA as

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[124] 42 U.S.C. §§ 7401-42 (1988), Codifying Pub.L. No. 95-95, 91 Stat. 685 (1977) as amended.
[125] 42 U.S.C. § 7413(c).
[126] *Id.* § 7413(c)(6).
[127] *See id.* § 7413(c)(1) & (3).

discharges cannot lawfully be made into the environment without a permit.[130] The criminal provisions of the CWA proscribe knowing and negligent conduct by a "person."[131] For the offense of failing to report discharges of hazardous substances or oil into the environment, an additional factor for consideration is whether the person is alleged to be the "person in charge" of a vessel or facility.[132] The definition of "person" includes a "responsible corporate officer."[133] The CWA imposes liability on such persons who knowingly discharge pollutants into waters of the United States without a permit or who violate an effluent limitation, pretreatment requirement, or permit condition.[134] Again, like the CAA, knowing false statements in a document filed for purposes of compliance with the Act or knowing falsifications or tampering with required monitoring devices are also criminal violations.[135] The CWA also provides for criminal sanctions against any person who knowingly or negligently discharges a pollutant into the waters of the United States that places others in imminent danger of death or serious bodily injury.

3. Resource Conservation and Recovery Act. The Resource Conservation and Recovery Act (RCRA) governs the reporting and record-keeping requirements related to the storage, treatment, and disposal of hazardous wastes. RCRA defines a "person" to whom the criminal provisions are applicable as individuals as well as corporations and does not exclude corporate officers or employees.[136] However, unlike the CWA and CAA, RCRA

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[128] *See id.* § 7413(c)(2).
[129] *See id* at § 7413(c)(4) & § 7413(c)(5).
[130] 33 U.S.C. § 1342.
[131] 33 U.S.C. § 1319(c)(1), (c)(2). Again, the term person applies to both individuals and corporations. *See* 33 U.S.C. § 1362(5).
[132] 33 U.S.C. § 1321(b)(5).
[133] 33 U.S.C. § 1319(c)(6).
[134] 33 U.S.C. § 1342.
[135] 33 U.S.C. § 1319(c)(4).
[136] 42 U.S.C. § 6093(15).

does not include the term responsible corporate officer.[137] A "person" who knowingly generates and transports a hazardous waste either to an unpermitted facility or without the required manifest faces criminal sanctions.[138] RCRA requires criminal liability for a person who knowingly treats, stores, or disposes of any hazardous waste at a facility without a permit or in knowing violation of a permit.[139] The Act also prohibits knowing false statements or omissions in required documents or knowingly failing to file such documents;[140] knowing destruction, alteration, or concealment of required records;[141] knowing export of hazardous wastes without consent or in violation of agreements between the United States and the receiving country.[142] In addition, criminal liability may arise if a person was engaged in conduct related to treatment, storage, or disposal of hazardous wastes that might present an imminent and substantial endangerment to human health or the environment.[143]

4. Comprehensive Environmental Response, Compensation and Liability Act. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) governs the cleanup of hazardous substances from abandoned sites and provides an emergency response system for the release of hazardous substances. The criminal provisions of CERCLA can be applied against three categories of violators: (1) a "person in charge" of a vessel or facility, (2) a "person" who fails to report a release, (3) the "owner or operator" of a facility. Failure of a "person in charge" of a vessel or a facility to immediately

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[137] In United States v. MacDonald & Watson Oil Co., the First Circuit refused to extend RCRA liability on the RCO doctrine. *See* United States v. MacDonald & Watson Oil Co., 933 F.2d 35 (1st Cir. 1991).
[138] 42 U.S.C. § 6928(d)(6) and (d)(2).
[139] *Id.* § 6928(d)(2).
[140] *Id.* § 6928(d)(3).
[141] *Id.* § 6928(d)(4).
[142] *Id.* § 6928(d)(6).
[143] *See* 42 U.S.C. §§ 6928(d)-(e), 6992d(b) & (c).

report a release of a reportable quantity of a hazardous substance is a criminal offense.[144] Knowing and willful failure to report a release of certain identified chemicals by a "person" is also an offense under the Emergency Planning and Community Right-to-Know Act,[145] which was added as part of the SARA amendments.[146] CERCLA also calls for criminal culpability for an "owner or operator" at the time of the disposal of a hazardous waste, or the current owner or operator, who knowingly fails to report the site to the EPA, or knowingly fails to maintain, destroys, or falsifies required records.[147] Although courts have not yet interpreted "owner or operator" in a criminal context, possible application of the terms may be made by analogy to findings of liability in civil cases that have addressed the applicability of the terms. Later, this article will address the findings of the Supreme Court related to its holding of "owner or operator" liability in *United States v. Bestfoods*.[148]

B. Case Law Standards for *Mens Rea*. As discussed above, the case law analyzing environmental statutes tends to reduce the standard of proof required for a knowing violation. This is mostly a result of the public welfare doctrine and the presumption of guilty knowledge that comes from dealing with hazardous substances coupled with the concept that the public cannot protect itself from such dangers.[149] Furthermore, due to the pervasively regulated nature of such activities, persons involved in them "have every reason to be aware that their activities are regulated by law, aside from the rule that ignorance of the law is no excuse."[150] The following cases show the breadth of applicability of the "knowingly" *mens rea* requirement in environmental statutes.

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[144] *See* 42 U.S.C. § 9603(b)(3).
[145] 42 U.S.C. §§ 11001-50.
[146] *See id.* § 11045(b)(4).
[147] 42 U.S.C. § 9603(c) & (d).
[148] *See Bestfoods*, 524 U.S. 51.
[149] *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).
[150] United States v. Dean, 969 F.2d 187, 192 (6th Cir. 1992).

1. *United States v. Weitzenhoff*

In *United States v. Weitzenhoff*[151], the defendants were managers of a sewage treatment plant in Hawaii. The plant had a National Pollutant Discharge Elimination System permit for the discharge of suspended solids and biochemical oxygen demand into the ocean.[152] When waste activated sludge began to accumulate at the plant, the managers gave instructions to employees to systematically dispose of the sludge by pumping it into the outfall pipe at the treatment plant which subsequently discharged directly into the ocean. Because this sludge then bypassed the effluent monitoring device, it was not reported in the plant's discharge monitoring reports. These discharges between April 1988 to June 1989 caused the plant to be in violation of the plant's average effluent limitation during most of that time period.[153] At trial, the managers were found in violation of the CWA § 309 for knowingly discharging pollutants in violation of their permit.[154]

On appeal, the managers of the plant argued that the court erred by not requiring the government to prove they knew their actions, or failures to act, were unlawful, and by not instructing the jury that it was a defense that they believed the discharges were allowed under the plant's permit as an appropriate bypass.

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[151] 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

[152] CWA § 402 provides the permitting process that allows for the discharge of pollutants in compliance with the requirements of the Act. The section is titled, National Pollutant Discharge Elimination System (NPDES); permits granted under this section are known as NPDES permits.

[153] *Weitzenhoff*, 35 F.3d 1275 at 1282.

[154] The relevant portion of 33 U.S.C. § 1319(c)(2) provides:

> **(2) Knowing violations**
>
> Any person who—
>
> Knowingly violates section . . . 1311 . . . of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section . . . of this title . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

The Ninth Circuit held that the term "knowingly" as used in the CWA does not require proof that a defendant knew that their conduct was illegal.[155] The court found the use of the term "knowingly" in the CWA to be ambiguous, and after considering the legislative history of the 1987 amendment to the Act that changed the *mens rea* from "willfully" to "knowingly," the court concluded that "[b]ecause they speak in terms of 'causing' a violation, the congressional explanations of the new penalty provisions strongly suggests that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[156]

The court's holding in *Weitzenhoff* seems to apply a standard for *mens rea* that approximates the same level of criminal culpability, or lack thereof, for strict liability.[157] This case causes concern for the regulated community as it stands for the proposition that individuals can be held liable for violating permit conditions even when they have a good-faith belief in the legality of their actions.[158] Since permits are required in many of the environmental statutes, and by their nature are complicated and difficult to execute, the potential exist for criminal liability for responsible "persons" even though the law was violated unknowingly. Of even greater concern to some was the court's conclusion that environmental laws are public welfare statutes.[159] Referring to *United States v. International Minerals & Chemical Corp.*, the court found that case "held that the term 'knowingly' referred to the acts made criminal rather than a violation of the regulation, and that

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[155] *Id.* at 1284.
[156] *Id.*
[157] *See* REITZE, *supra* note 18, at 578.
[158] *See* CARR, ET AL., *supra* note 13, at 208.
[159] *Id.* at 209.

'regulation' was a shorthand designation for specific acts or omissions contemplated by the Act."[160]

The Ninth Circuit issued an amended opinion in *Weitzenhoff* affirming its previous opinion but revising it to address the holdings in *Staples* and *Ratzlaf* and their applicability to treatment of environmental statutes as public welfare statutes.[161] As discussed above, *Staples* and *Ratzlaf* seemed to express concern about relaxing the *mens rea* requirements for any crime, including public welfare offenses, where the defendant may face a substantial prison sentence.[162] The Ninth Circuit distinguished those cases however on the basis that neither case involved "conduct which a reasonable person necessarily should know is subject to strict public regulation."[163] The Court specifically found that the Supreme Court in *Staples* showed their support for application of the public welfare offense doctrine because the Court contrasted the statute at issue in the *Staples* case with other regulatory regimes, "specifically those regulations that govern handling of 'obnoxious materials.'"[164]

2. *Unites States v. Wilson*

In *United States v. Wilson*[165], the Fourth Circuit sets out what may be the most demanding test for determining the necessary knowledge requirement to prove that a defendant "knowingly" committed an environmental crime. This case also addressed a violation of CWA § 309, but in this case the violation involved a wetlands issue. The defendants were convicted of discharging fill material and excavated dirt into wetlands

[160] *Weitzenhoff*, 35 F.3d at 1284 (citing International Minerals & Chemical Corp., 402 U.S. at 560-562).
[161] 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).
[162] *Staples*, 114 S.Ct. at 1799 (citing Liparota v. United States, 471 U.S. 419, 426 (1985).
[163] *Weitzenhoff*, 35 F.3d at 1285.
[164] *Id.* (citing Staples v. United States, 114 S.Ct. at 1798.
[165] 133 F.3d 251 (4th Cir. 1997).

without a permit.[166] Over a five-year period, the defendants attempted to drain a number of properties during the land development phase of a construction project. The parcels contained lands which were later identified as wetlands, yet no effort had been made to pursue permits to dredge or fill the wetlands. At trial, evidence was presented that identified the physical characteristics of the land as wetlands and showed a hydrologic connection to the Potomac River, a tributary of the Chesapeake Bay.[167] On appeal, the defendants challenged the jury instruction on two bases; first that jury instruction improperly stated the *mens rea* required to be proved was the defendants knew that their conduct was unlawful, and second, that the jury instruction failed to require that the defendants must be shown to have had a "knowingly" criminal intent as to each of the elements of the offense.[168]

The Fourth Circuit disagreed with the defendant's challenge to the instructions based on the assertion that the government should have to prove awareness of the illegality of their conduct, but agreed that the instructions did not adequately instruct the jury that the government's burden is to prove knowledge with regard to every element of the offense.[169] In what appears to be a misapplication of the Supreme Court's analysis of the knowledge requirement in *International Minerals*, the Fourth Circuit cites to *International Minerals* for the proposition that the use of "knowingly violates" in the statute requires proof that the defendant must have knowledge of the facts meeting each essential element of the offense.[170] In the case of a permit violation such as this, to sustain a conviction, the government must prove the defendant knew that he did not have a permit.[171] As it relates to the knowledge of

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[166] The CWA prohibits the discharge of dredged or fill material into the navigable waters of the United States without a permit.
[167] *Wilson*, 133 F.3d. at 254-255.
[168] *Id.* at 260.
[169] *Id.* at 265.
[170] *Id.* at 262.
[171] *Id.* at 264.

the lack of a permit, the Fourth Circuit is in complete disagreement with the Ninth Circuit's conclusion in *Weitzenhoff* that it is irrelevant "whether the polluter is cognizant of the requirement or even the existence of the permit."[172]

The Fourth Circuit's requirement of proof that the defendant knew he did not have a permit would appear to be inapposite to the Supreme Court's subsequent opinion in *United States v. Bryan*.[173] In *Bryan*, the Court interpreted both "knowingly" and "willfully" as used in the Firearms Owners' Protection Act[174] prohibiting unlicensed dealing in firearms. The statute in question contained three provisions that used the term "knowingly" and one that used "willfully."[175] The defendant was found guilty of dealing in firearms without a license in violation of 18 U.S.C. § 924(a)(1)(D), the provision requiring a "willful" violation. At trial, the defendant made a motion that the jury be instructed that he could not be found guilty unless he had knowledge of the licensing requirement. The trial court declined to instruct the jury in that way, instead instructing that a person "need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something the law forbids."[176]

The Supreme Court distinguished "knowingly" and "willfully" in relation to culpability and stated "the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law," rather, "'the knowledge requisite to

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[172] *Weitzenhoff*, 35 F.3d at 1284.
[173] 524 U.S. 184 (1998).
[174] 18 U.S.C. § 922(1)(a).
[175] Specifically, Title 18, U.S.C. § 924(a)(1) provides in relevant part:

> Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—
> (A) knowingly makes any valse statement . . .
> (B) knowingly violates subsection . . .
> (C) knowingly imports or brings into the United States . . .
> (D) willfully violates any other provisions of this chapter,
> shall be fined under this title, imprisoned not more than five years or both.

[176] United States v. Bryan, 524 U.S. at 189.

knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.'"[177] The Court held that knowledge of the law was not required to prove that the defendant acted "willfully" under this statute; knowledge that the conduct is unlawful is all that is required. Unlike certain cases involving highly technical statutes that presented the risk of catching individuals engaged in apparently innocent conduct unaware, this statute does not "carve out an exception to the traditional rule that ignorance of the law is no excuse."[178]

As articulated by the Court, the requirement for "knowingly" is a much lower standard than that required by the Fourth Circuit in *Wilson*. Although the court in *Wilson* stated that requirement of proof that a defendant knew that he did not have a permit was not to show that permits were available or required, the effect of it is to require proof of knowledge that the defendant's acts were unlawful.[179] This creates a standard much different from an offense with only a *mens rea* requirement of "knowingly" after *Bryan*. As the Court stated, "unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense."[180]

3. *United States v. Hayes International Corp.*

The Eleventh Circuit in *United States v. Hayes International Corp.*[181] addressed a conviction under RCRA Section 3008(d)(1)[182] for knowing transportation of hazardous waste

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[177] *Id.* at 192 (quoting Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 345 (1952) (Jackson, J. dissenting)).
[178] *Id.* at 196.
[179] *See Wilson*, 133 F.3d. at 264. Since the court required proof of knowledge to all statutory elements of the offense, it had to justify how requiring proof of awareness of illegality of conduct by knowledge that the defendant did not have a permit was not proof of knowledge of the unlawfulness of the act. While the court states that the purpose of the requirement is to preserve a mistake of fact defense, it appears to be a rationalization to remain consistent with its interpretation of how "knowingly" in the statute required proof of knowledge to every essential element of the offense.
[180] United States v. Bryan, 524 U.S. at 193.
[181] 786 F.2d 1499 (11th Cir. 1986).
[182] The relevant portion of 42 § 6928(d)(1) is set forth as follows:

to an unpermitted facility. The defendants in *Hayes* contracted with another company, Performance Advantage, Inc., to dispose of hazardous wastes for them. The wastes were transported from the Hayes to the third party on several different occasions between January 1981 and March 1982.[183] Subsequently, over six hundred drums of wastes generated by Hayes were found illegally disposed of by Performance Advantage.

The defendants contend on appeal that they did not commit any "knowing" violation because they misunderstood the regulations, that they did not know that Performance Advantage did not have a permit, and that they did not commit a knowing violation because they were under the mistaken belief[184] that Performance Advantage was recycling the waste. As stated by the court, "the degree of knowledge necessary for a conviction under 42 U.S.C. § 6928(d)(1), unlawful transportation of hazardous waste, is the principal issue in this appeal."[185]

The court first considered the legislative history in section 6928(d) and found that Congress had "not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles."[186] The court then turned to

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(d) Criminal penalties
Any person who—
(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . . shall upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.

[183] *Hayes,* 786 F.2d at 1501.

[184] There are some scenarios where a good-faith belief could give rise to a mistake of fact defense. In *International Minerals*, the Supreme Court found that in a case involving "knowing" shipment of dangerous chemicals, a person who believed in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered. United States v. International Minerals, 402 U.S. at 563-564. The court in *Hayes* also would have applied the mistake of fact, in principle, if the facts were that the defendant reasonably believed that the materials were actually being recycled. Hayes, 786 F.2d at 1506. *See also* United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996) and United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

[185] *Id.* at 1500.

[186] *Id.* at 1502, citing *to* S.Rep. No. 172, 96th Cong., 2d Sess. 39 (1980), U.S. Code Cong. & Admin.News 1980, pp. 5019, 5038.

International Minerals and found that this statute is not drafted in such a way as make knowledge of the illegality an element of the offense; in addition, the court found that section 6928(d) was "undeniably" a public welfare statute.[187] Accordingly, "it would be no defense to claim no knowledge that the paint waste was a hazardous waste . . . nor would it be a defense to argue ignorance of the permit requirement."[188] Therefore, the government does not have to prove that the waste was hazardous or that a permit was required. Nonetheless, the court found congressional purpose was that knowledge of the permit status was required. In this case, the word "knowingly" in the statute immediately precedes the word "transports" and is not set out as a modifier for all subsequent elements in an offense, yet the court is willingly to interpret that Congress intended a showing of knowledge of the permit status. The government's burden in proving this knowledge is met if the defendant willfully fails to determine the permit status. Furthermore, the "existence of the regulatory scheme" and the inferences it raises of procedures and common knowledge involved in the transportation and disposal of hazardous wastes will also satisfy the burden.[189]

VI. Theories of Officer Culpability in the RCO Doctrine

The liability that is derived at least in part from the criminal intent of the accused is only half of the picture; to whom that intent is ascribed is another important element in most environmental statutes. For the purposes of this article, the focus remains on how a corporate officer or agency official is drawn within the sphere of liable criminal parties in an environmental prosecution. The starting point for determining how corporate officers can be drawn under the umbrella of liability is the personal jurisdiction over the individual through

[187] *Id.* at 1503.
[188] *Id.*

the criminal provisions in the environmental statutes. As mentioned above, that begins with the finding that the corporate officer is determined to be a person subject to liability under one of the environmental statutes. Again, a person is at least always defined as an individual, and in both the CWA and the CAA, that definition has been expanded statutorily to include a "responsible corporate officer."[190] The import of those characterizations is examined in the following sections where the development of public welfare statues and lessening standards for *mens rea* has led to an expansion of the RCO doctrine to encompass a public welfare application to environmental criminal law.

There have been a number of different decisions applying the RCO doctrine to environmental statutes, and almost as many methods of application. Generally, the decisions follow three approaches to the doctrine: (1) the RCO doctrine does not negate the *mens rea* element of a crime; (2) the RCO doctrine applies, even though there's ample proof of actual knowledge of the violation; (3) the RCO doctrine applies to find an accused guilty of a criminal violation as a result of his position as a corporate officer. The importance of these various approaches remains relevant for corporate officers and federal agency officials unless and until the U.S. Supreme Court grants *certiorari* on an RCO doctrine case from one of the Circuits. Regardless, there are a number of environmental cases decided on the basis of the RCO doctrine that been denied *certiorari* by the Court; the presumption from that is that the rationale used by the respective appellate court was correct. [191]

A. *United States v. MacDonald & Watson Oil Co.*

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[189] *Id.* at 1504-1505.

[190] *See* CAA §§ 7602(e) and 7413(c)(6), RCRA § 6903(15), CWA §§ 1652(5) and 1319(c)(6), and CERCLA § 9601(21).

[191] *See* United States v. Johnson & Towers, Inc., 741 F.2d 662 (3rd Cir. 1984); United States v. Dee, 912 F.2d 741, (4th Cir. 1990), *cert. denied.*, 111 S. Ct. 1307 (1991); United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 939 (1995).

Under the first approach, as best demonstrated by *United States v. MacDonald & Watson Oil Co.*[192], the issues involved violations of RCRA for the knowing disposal of hazardous wastes without a permit and also for CERCLA violations under CERCLA section 9603(b) for knowing failure to report the release of a hazardous substance.[193] In *MacDonald & Watson*, the president of the corporation (among other individual and corporate defendants) challenged his conviction in a federal district court arguing that he had not "knowingly" violated RCRA. At trial, evidence was adduced that while the president was involved in the day-to-day operations of the company and was aware that the company had improperly disposed of hazardous wastes in the past, he was not aware of the particular violations at issue in this case.[194] Examining the RCO doctrine, the First Circuit held that the corporate officer's position alone was not enough to prove the defendant's knowledge. Critical to the Court was that a person's status as a responsible corporate officer was not a substitute for proof of knowledge for a crime with a specific knowledge element.[195] The Court also distinguished *Dotterweich* and *Park*. Acknowledging that the cases stood for well-established law in public welfare statutes where there is not an express *scienter* requirement, the Court said however, "we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute."[196]

B. *United States v. Brittain*

The second approach or "modified RCO doctrine" cases consist of those where there was a showing of actual knowledge of wrongdoing on the part of the defendant, yet notwithstanding that demonstration, the court relied at least to some extent on the RCO

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[192] 933 F.2d 35 (1st Cir. 1991).
[193] *Id.* at 50.
[194] *Id.* at 50-51.
[195] *Id.* at 55.

doctrine. In *United States v. Brittain*[197], a public utilities director was found guilty of discharging pollutants into waters of the United States in violation of the CWA. Raising the issue *sua sponte*, the Tenth Circuit Court found the RCO doctrine applicable to the facts of this case.[198] While the Court recognized that the jury considered the defendant's specific conduct and not just the corporate officer's position, it still discussed, arguably in dicta, that a responsible corporate officer, "to be held criminally liable . . . would not have to 'willfully or negligently' cause a . . . violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."[199] Nevertheless, the Court's views are generally consistent with the Third Circuit's opinion in *Johnson & Towers* and are seen as one of the broadest applications of the doctrine.[200]

C. *United States v. Dee*

The third approach, a "pure" application of the RCO doctrine tends to equate an individual's corporate position as the basis for determining liability and dispensing with the *mens rea* requirement in an environmental statute. The analysis from *Johnson & Towers* above, and the Fourth Circuit in *United States v. Dee*[201] are prime examples of this category. The "*Aberdeen case*," as *United States v. Dee* is commonly referred to in the military, involved the prosecution of three, high-level, federal civilian employees for violations of RCRA stemming from a multitude of offenses related to the improper storage and disposal of hazardous wastes at Aberdeen Proving Ground, a U.S. Army installation in Maryland. Although the RCO doctrine is not mentioned in the opinion, the Court discusses the defendant's positions as department heads responsible for ensuring that procedures relating

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[196] *Id.* at 51-52.
[197] 931 F.2d 1413 (10th Cir. 1991).
[198] *Id.* at 1419.
[199] *Id.*

to RCRA responsibilities were followed and that their subordinates were aware of and in compliance with the procedures.[202]

Relying on *International Minerals*, the Court then found that the extremely hazardous nature of the substances[203] that were the subject of the violations required that the government did not have to prove that the defendants knew violation of RCRA was a crime nor that the chemical wastes were listed as RCRA hazardous wastes.[204] The Court used the public welfare rationale from *International Minerals* to reject the defendants' argument that they did not "knowingly" violate RCRA. When the public welfare analysis is read together with the Court's continued attention to the positions of the defendants and their responsibilities, this case can be seen as a pure application of the RCO doctrine based on the positions of the responsible officials.

VII. Recent Applications of the RCO Doctrine

A. *United States v. Iverson*

In 1999, the Ninth Circuit took up the case of *United States v. Iverson*.[205] Mr. Iverson was the founder, President, and Chairman of the Board of CH20, Inc., a company that blended and distributed chemicals and chemical products. CH20 shipped the chemicals to customers in drums and then reused any returned drums after cleaning them. During different periods between 1985-1988 and then again between 1992-1995, Iverson personally discharged and directed employees to illegally discharge the wastewater that resulted from

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[200] *See* Hustis & Gotanda, *supra* note 123, at 174.
[201] 912 F.2d 741 (4th Cir. 1990), *cert denied*, 11 S. Ct. 1307 (1991).
[202] *Id.* at 747.
[203] All three defendants were chemical engineers working for the United States Army and assigned to the Chemical Research, Development, and Engineering Center in the development of chemical warfare systems. *Id.* at 741.
[204] *Id.*

the drum cleaning operation onto the plant's property, through a sewer drain at another property belonging to the defendant, and through a sewer drain at the defendant's home. Iverson was convicted of violations of the Clean Water Act and state and local law[206] and sentenced to one year in custody, three years of supervised release, and a $75,000 fine.[207] At trial, the prosecution argued that Iverson could be liable under the CWA as a responsible corporate officer. The trial court instructed the jury that Iverson could be found liable as a RCO under the CWA if he met the following criteria: "(1) that the defendant had knowledge of the fact pollutants were being discharged to the sewer system by employees of CH20, Inc.; (2) that the defendant had the authority and capacity to prevent the discharge of pollutants to the sewer system; and (3) that the defendant failed to prevent the on-going discharge of the pollutants to the sewer system."[208] Iverson was found guilty and appealed to the Ninth Circuit Court of Appeals where he argued that a corporate officer is only "responsible" when he exercises control over the activity causing the discharge.[209] In addition, the defendant also argued that the "responsible corporate officer" instruction allowed the jury to convict him without finding a violation of the CWA.[210]

The court's analysis tracked the development of the responsible corporate officer doctrine through *Dotterweich* and *Park* and cited to applications of the doctrine in other Clean Water Act cases.[211] The court then reviewed the actions by Congress in 1987 to revise and replace the criminal provisions, "most importantly" making a violation of the CWA a

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[205] 162 F.3d 1015 (9th Cir. 1999).
[206] The state and local laws are not federal offenses. However, the CWA allows states to administer water pretreatment programs and, if EPA approves a state's program, violations of those regulations are treated as federal criminal offenses. *See* 33 U.S.C. § 1342(b) and 1319(c)(2).
[207] *Iverson*, 162 F.3d at 1019.
[208] *Id.* at 1022.
[209] *Id.*
[210] *Id.* at 1026.

felony rather than a misdemeanor. Also important to the court was that Congress made no changes to the CWA "responsible corporate officer" provision, especially since such changes came much after *Park* was decided. The court stated, "[t]hat being so, we can presume that Congress intended for *Park*'s refinement of the "responsible corporate officer" doctrine to apply under the CWA."[212]

The Ninth Circuit found that the "responsible corporate officer" instructions were not erroneous, reasoning that the "instruction relieved the government *only* of having to prove that the defendant *personally* discharged or caused the discharge of a pollutant. The government still had to prove that the discharges violated the law and that the defendant knew that the discharges were pollutants."[213] The court agreed with the trial court and upheld the district court's interpretation of the doctrine and the instruction, finding that under the CWA, a person with the authority to control the activity that violated a provision is a responsible corporate officer.[214] Furthermore, the court found that "[t]here is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity."[215] Thus, the opinion appears to hold that a potentially unknowing corporate officer could be found liable for a criminal violation solely on the basis of his position in corporate authority.

B. *United States v. Ming Hong*

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[211] *See* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir.) and United States v. Frezzo Brothers, Inc., 602 F.2d 1123, 1130 (3rd Cir. 1979). *See Iverson,* 162 F.3d at 1024 and n.3.
[212] *Id.* at 1024.
[213] *Id.* at 1026.
[214] *Id.* at 1025.
[215] *Id.*

The Fourth Circuit was the first circuit court to interpret the RCO doctrine after *Iverson*.[216] In *United States v. Ming Hong*[217], the Fourth Circuit gave favorable treatment to the Ninth Circuit's analysis of the "responsible corporate officer."[218] This case involved the operation of a wastewater treatment facility by Mr. Hong that ultimately began discharging untreated wastewater in violation of the facility's discharge permit. Mr. Hong was convicted of negligently violating pretreatment requirements under CWA § 1319(c)(1)(A).[219] On appeal the defendant challenged the district court's treatment of him as a responsible corporate officer; specifically, he argued that the government failed to prove that he was a designated officer of the company and in the alternative if this was not required, that he did not exercise sufficient control over the company's operations to be responsible for the violations.[220]

The defendant acquired the wastewater treatment facility in 1993 and subsequently made several changes to the name of the company, eventually calling it Avion Environmental Group.[221] Despite his avoidance of formal association with the company and not being identified as an officer of Avion, the defendant controlled the company's finances and played a major role in the operations of the company.[222] The court in *Hong* held that the government did not have to prove that the defendant was a designated corporate officer; "[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or

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[216] The analysis in the *Iverson* decisions was followed again in the Ninth Circuit in *United States v. Cooper* and in the Eleventh Circuit in *United States v. Hansen*. *See* United States v. Cooper, 173 F.3d 972 (9th Cir. 1999), *cert. denied.*, 528 U.S. 1019 (1999) and United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001).
[217] 242 F.3d 528 (4th Cir. 2001).
[218] After discussing *Dotterweich* and *Park*, the court cites to *Iverson* as setting out the principles for determining when an individual is a responsible corporate officer under the CWA. *See id.* at 531.
[219] *Id.* at 529-530.
[220] *Id.* at 530.
[221] *Id.* at 529.
[222] While not listed as a corporate officer of Avion, the defendant maintained an office on the premises at Avion, reviewed marketing reports, suggested marketing strategies, controlled Avion expenses, and signed a lease as president of Avion. *See id.*

lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable."[223] Furthermore, the court found that the defendant was involved in the purchase of a wastewater treatment system and had knowledge that the system was ineffective in treating the facility's wastewater and was regularly present at Avion while discharges openly occurred.[224] The court found these matters, when considered with the defendant's substantial control of corporate operations, provided ample evidence that Hong had the authority to prevent the illegal discharges.

VIII. Application of the RCO Doctrine to Federal Officials

Notwithstanding the fact that none of the cases below involving federal employees use the words "responsible corporate officer" anywhere in the text of any of the opinions, they evidence the application of the RCO doctrine to agency employees in the conduct of their official duties. Like a corporate officer, these individuals are treated as if they've stepped out of their official capacity when their conduct rises to the level of criminal activity.[225] While there may be some latitude for the actions of federal officials in the performance of official duties, there is no blanket immunity for federal employees from criminal prosecution.[226]

A. *United States v. Dee*

As mentioned above, the case of *United States v. Dee* involved the prosecution of three high-ranking federal civilian employees of the United States Army. The Fourth Circuit never used the words "responsible corporate officer doctrine," however; the case is generally

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[223] 242 F.3d 528, 531.
[224] *Id.* at 532.
[225] *See Dee*, 912 F.2d at 744.
[226] *See Id.*

accepted as a pronouncement of the RCO doctrine.[227] The Court instead said that the defendants were responsible for the control and maintenance of the chemical storage facilities and therefore they could be liable for the poor management of the hazardous wastes therein and the subsequent criminal offenses.[228] The important aspect for federal employees and agency officials is that federal employees are not exempt from liability under RCRA; in fact, a federal employee, when sued in his official capacity is still an "individual" under the definition of a "person" in RCRA.[229] Furthermore, the Court stated that "[e]ven where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office."[230] While the *Aberdeen case* may be the leading decision for what has also been called the "responsible federal employee doctrine,"[231] there are two other circuit court cases that have applied the RCO doctrine to federal employees as well.

B. *United States v. Carr*

In the first of these, *United States v. Carr*[232], the Second Circuit's opinion focused on who is a "person in charge" under CERCLA. Mr. Carr was a maintenance foreman employed by the Army at Fort Drum. Carr directed a work crew to dispose of waste paint cans in a pond in violation of CERCLA. After learning from his subordinates that the cans were leaking into the man-made pond, Carr instructed the employees to fill in the pond with dirt. He was then found guilty of failing to report the unauthorized release of the hazardous substances in the cans. Carr argued that he was not a "person in charge" due to his

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[227] *See generally* Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case For Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137 (1994).
[228] *Dee*, 912 F.2d 741, 748-749.
[229] *Id.* at 744 (citing RCRA § 6903(15)).
[230] *Id.*
[231] *See generally* Minister, *supra* note 226.
[232] 880 F.2d 1550 (2nd Cir. 1989).

"relatively low rank."[233] The Court found that, "Congress intended . . . to reach a person--even if of relatively low rank--who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances."[234] Again although not specifically mentioning the RCO doctrine, the Court used the typical "control" language of the public welfare cases to express a "responsible relation" between Carr and his ability to prevent the hazard, just as in *Dotterweich.*

C. *United States v. Curtis*

The most recent case involving a federal employee to be reviewed at the Circuit level was *United States v. Curtis*.[235] Mr. Curtis was the Fuels Division Director at Adak Naval Air Station. He was found guilty of discharging pollutants into the waters of the United States in violation of the CWA. Specifically, he directed his employees to pump jet fuel into a pipeline that he knew would leak. The fuel ultimately did leak into a stream. As in the other federal employee cases, Mr. Curtis argued that he was not a "person" under the CWA because federal employees were not included in the definition of a "person" liable for prosecution under the Act.[236] Citing to the *Aberdeen case*, the court said that the defendant's claim for immunity was no different than the claims made by the defendants in that case.[237] The Court found "clear and unambiguous" congressional intent to bring federal employees within the jurisdiction of persons who are subject to criminal liability under the statute.[238] "In accord with the statutes' plain meaning, individual federal employees acting within the

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[233] *Id.* at 1554.
[234] *Id.*
[235] 988 F.2d 946 (9th Cir. 1993).
[236] *Id.* at 947.
[237] *Id.* at 947-948.
[238] *Id.* at 948.

course and scope of their employment are subject to criminal prosecution for violation of the Clean Water Act."[239]

D. Rationale for Application to Federal Employees

The criminal liability of federal employees, to include military personnel, for violations of environmental laws is also affected by principles of sovereign immunity and official immunity due to their status as government officials. The concept of sovereign immunity is a judicially created doctrine that makes the United States, absent an express waiver of sovereign immunity by Congress, immune from all suits.[240] Since sovereign immunity may apply if an individual was being prosecuted in an official capacity, the main issue is presented when a federal employee faces criminal prosecution as an individual. When an individual is prosecuted in this capacity, the doctrine of official immunity may protect federal officials from state criminal prosecutions, so long as that individual is performing official duties.[241] This concept is based on the Supremacy Clause of the U.S. Constitution[242] and is traced to the seminal case of *In re Neagle*.[243]

In *Neagle*, the Supreme Court held that a U.S. deputy marshal, while performing his official duties defending a Supreme Court justice, could not be prosecuted by California for murder of person who attacked the justice. The Court stated that if a marshal "is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a

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[239] *Id.* at 949.
[240] *See* James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279 (1991)
[241] *See* Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVT. L. 1 (1991).
[242] U.S. CONST. art. VI, cl.2.
[243] 135 U.S. 1 (1890).

crime."[244] The Court, discussing the supremacy of the federal government over the states, quoted *Tennessee v. Davis*[245] regarding the importance of official immunity: "[T]he general government . . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court . . . the operations of the general government may at any time be arrested at the will of one of its members . . ."[246] The standard that has been applied following *Neagle* is a two-part test: (1) was the federal employee performing an act authorized by federal law; (2) were the actions of the employee necessary and proper in the performance of the authorized act.[247]

In application to the prosecution of environmental crimes, the doctrine would likely preclude a state criminal prosecution against a federal official as long as that individual's actions met the test as set out above.[248] However, if the prosecution was based on the failure of the employee to perform a required duty, or negligence in the performance of that duty, a responsible corporate officer analysis could then apply to the actions of the employee as the official immunity would not preclude prosecution. While none of these cases specifically referred to these federal employees as "responsible corporate officers" in the finding of liability for these defendants, the results plainly show the application of the RCO doctrine to federal employees in the conduct of their official duties.[249] While an employee or agency

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[244] *Id.* at 75.
[245] 100 U.S. 257, 262-263 (1879) (quoting Martin v. Hunter's Lessee, 14 U.S. 304, 363 (1816).
[246] *Id.* at 61-62.
[247] *See* Smith, *supra* note 241, at 38 (citing to Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988) for the modern application of the doctrine).
[248] In a federal prosecution for federal crimes, "[t]he supremacy clause concerns which give rise to *Neagle*-type immunity are not implicated." United States v. Dee, 912 F.2d 741, 744, f.7 (1990).
[249] Patrick O. Cavanaugh & Christopher Harris, *Environmental Crimes and the Responsible Government Official*, NAT. RESOURCES AND ENVT. 23 (1991) at 23.

official may not "receive a benefit commensurate to the risk"[250] in the form of salary or dividends enjoyed by a corporate official, or the same authority to effect policy within their organization, they will be treated the same due to the supervisory position of the employee and the substantial control they exert over the illegal activity.

The concept that the RCO doctrine creates a duty on the part of a superior in a position of authority to be aware of and accountable for violations within their span of control is a theme central to military command principles.[251] "[T]he requirements of public welfare statutes and the responsible corporate officer doctrine fit perfectly within the philosophy of command. They emphasize authority and responsibility as the basis of imposing criminal liability; the key elements of command are authority and responsibility."[252] Such an imposition of criminal culpability is analogous to a criminal offense under the military justice system for dereliction of duty.[253] The idea that the military leader is responsible for conditions that occur under his watch is in lock step with command responsibility. The concept of command responsibility, the law of armed conflict doctrine that superiors can be held liable for the substantive crimes of their subordinates,[254] is analogous to the RCO doctrine at least for the notion that a duty to supervise also creates responsibilities. The failure to take measures within a commander's authority may result in the commander's culpability for the actions of his subordinates.[255]

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[250] *See generally* Margaret K. Minister, *supra* note 227, at 174.
[251] "The Supreme Court, in essence, has found that corporate officers have a duty to know about the violations within their dominion and control, and that lack of knowledge is no defense" Jane F. Barrett &Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991).
[252] *See* Calve *supra* note 240, at 346.
[253] *See* 10 U.S.C. § 892.
[254] *See* Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates -- The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272 (1997). *See also* Calve, *supra* note 240, at 301.
[255] *See* Calve, *supra* note 240, at 301.

The nature of the corporate structure, like a military organization, makes the person in charge of the organization the one responsible for, and gives that individual authority over, the direction of the organization and its policies.[256] The position of the individual makes a finding of vicarious criminal liability an almost inevitable finding; "separating position from authority may be an impossible task for a jury."[257] While there have been no prosecutions against military members under the RCO doctrine, the possibility certainly is present and has been a suggested client counseling topic by military legal counsel.[258]

IX. Criticisms of the RCO Doctrine

Although the RCO doctrine has been a feature of the American legal system at least since the early 1940's,[259] it has also been frequently criticized.[260] The most basic reason for this is the fundamental concept of criminal liability. As a society, Americans are loath to hold someone criminally responsible for acts they did not intend. Usually, criticisms of the doctrine attack the effect the doctrine has on any required *mens rea* element in a crime in recognition of that predilection.[261] The Supreme Court in *Staples* was concerned about the application of public welfare statutes that would do away with the *mens rea* requirement; saying this would, "criminalize a broad range of apparently innocent conduct."[262] However, in no application of the RCO doctrine to an environmental statute has the requirement for

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[256] *See* Christopher Harris, Patrick O. Cavanaugh, and Robert L. Zisk, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988).
[257] *Id.* at 233.
[258] *See* Brian J. Hopkins, *Environmental Crimes: Recent Case Law and Practice*, 19 A.F. L. REV. 1, 18 (1996).
[259] *See Dotterweich*, 320 U.S. 277 (1943).
[260] *See* Finn, *supra* note 90; Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 TOXICS L. REP. 1378 (1992); Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861, 866 (1996).
[261] *See* Finn, *supra* note 90 at 548.
[262] *See Staples*, 511 U.S. at 616.

proving *mens rea* been done away with; the requirement for knowledge of the underlying acts is still required and can be inferred as a result of the position and authority of the corporate officer. The decision always remains with the factfinder whether the defendant had the criminal intent required. Conversely, a strict liability crime would not require culpability or even an awareness of conduct on the part of the wrongdoer.[263] "Requiring the government to prove only that the defendant acted with awareness of his or her conduct does not render [a criminal provision] a strict liability offense."[264]

In that same vein, the public welfare statutes applying strict liability without requiring *scienter* were misdemeanor statutes, while the environmental statutes in which the RCO doctrine is being employed are felony statutes with express requirements of knowledge on the part of the accused. Some see this as a violation of a defendant's right to due process due to the imposition of significant penalties and the lowering of the government's burden to prove guilt.[265] As described above, there is even considerable debate about the applicability of the public welfare offense doctrine to environmental statues.[266] The Supreme Court even hints in *Staples* that punishing a violation of a public welfare statute as a felony may be inappropriate.[267] However, as mentioned above, the Court was unwilling to go that far in that case. Subsequent to *Staples* in *Weitzenhoff*, the Ninth Circuit distinguished *Staples* from their findings because of the regulation of "obnoxious materials" and because a reasonable person should know their conduct under environmental statues is subject to strict

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[263] LAFAVE, *supra* note 4, at 242-243.
[264] United States v. Sinskey, 119 F.3d 712, 717 (8th Cir. 1997).
[265] *See* Keith A. Gaynor, et al., *Improving Fairness in Environmental Enforcement*, 7 TOX. L. REP. 1029, 1031 n.84 (1993).
[266] *See also* Lazarus, *supra* note 259, at 866.
[267] *See Staples*, 511 U.S. at 616.

regulation.[268] Finding, therefore, that it was appropriate to consider an environmental felony statute under public welfare principles.

Another aspect of the felony nature of some of the criminal violations in the environmental statutes is what the intent of the legislation was in the statutes, particularly after the CAA and CWA were amended to include a "responsible corporate officer" as a person under each statute. While it can be argued that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing interpretations,"[269] when those amendments were made the statutes did not include felony violations. Regardless, if Congress was concerned about the application to felony violations perhaps they would have amended the statutes or corrected the application of the doctrine to other felony statutes, but they have not. Whether that represents a general malaise or an affirmation of the purpose of the environmental statutes to encourage a broader reach to remediate damaging effects on the environment.

The fact that the complex nature[270] of environmental law has led to much ambiguity also raises the application of the "rule of lenity" to environmental criminal provisions. A minority of courts have suggested that the rule of lenity should be applied to environmental criminal statutes because of that ambiguity.[271] Under that rule, when a statute is ambiguous, it should be interpreted in favor of the defendant.[272] "The purpose of narrowly construing criminal statutes is that, if ambiguous, a person would not have adequate warning that his or

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[268] *Weitzenhoff*, 35 F.3d at 1285.
[269] *See* Bragdon v. Abbott, 524 U.S. 624 (1998).
[270] "For those who dare to study, teach, or practice environmental law, its complexity is virtually a mantra." Lazarus, *supra* note 15, at 2428.
[271] *See* Jonathan Snyder, *Back to Reality: What "Knowingly" Really Means and the Inherently Subjective Nature of the Mental State Requirement in Environmental Criminal Law*, 8 MO. ENVTL. L. & POL'Y REV. 1, 11-12 (2002) for discussion of "rule of lenity and application to environmental criminal provisions.
[272] *See Iverson*, 162 F.3d at 1025.

her conduct is deemed illegal."[273] However, the rule of lenity only applies when there is a grievous ambiguity or uncertainty in the statute and when, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended."[274]

The RCO doctrine relies upon the characterization of individual criminal liability based upon the corporate position of the defendant and the concomitant authority to control activities inherent in that position. In light of the Supreme Court's decision in *United States v. Bestfoods,*[275] it appears that the Court could possibly reject such a broad approach to imposing environmental liability on corporate officers based on a lack of "actual control."[276] In this case, the Court would not extend liability to a parent corporation absent direct participation by the parent in the subsidiary's activities related to the offense.[277]

While defining "operator" under CERCLA, the Court presented a definition that could potentially derail a case based on the RCO doctrine; specifically, the Court may require an operator to be directly involved in activities having to do with the violation as opposed to being in a position to do something about it.[278] The test for owner liability under CERCLA was extended to the CAA in *United States v. Dell'Aquilla*[279] in the Third Circuit. There, the Court followed the *Bestfoods* test, applying that opinion's logic to a different environmental statute because of the shared purposes and language between the statutes.[280]

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[273] *See Snyder, supra* note 270, at 12.
[274] Muscarello v. United States, 524 U.S. 125, 141, L. Ed. 2d 111, 118 S.Ct. 1911 (1998) (quoted in *Iverson,* 162 F.3d at 1025, n.8).
[275] 118 S.Ct. 1876 (1998).
[276] *Id.* at 1886.
[277] *Id.* at 1887.
[278] *Id.*
[279] 150 F.3d 329 (3rd Cir. 1999).
[280] *Id.* at 334.

As *Iverson* was decided after *Bestfoods*, it's apparent that the Ninth Circuit was aware of the decision and did not find it bearing on their interpretation of the relevance of the RCO doctrine. Given that the opinion in *Bestfoods* addressed environmental liability and corporate responsibility, the Court may have a different view if the issue is raised as to whether the test of "actual control" is relevant only to parent-subsidiary liability or if it has a more general application.

X. Conclusion

While these criticisms raise issues for potential use of the RCO doctrine, the critical elements effecting the application of the doctrine by courts remain the concept of public welfare intertwined with the relevant knowledge of a corporate officer related to the criminal activity. When an individual, whether corporate officer, sewage treatment plant manager, or military installation commander, is in a position to have authority over dangerous activities that are highly regulated, it appears fairly certain that the majority of courts will find a way to make them responsible for that activity. Despite the appearance of a willingness to do so,[281] the responsible corporate officer doctrine has not been applied in the absence of some evidence of knowledge on the part of the corporate actor; what that knowledge is and what, if any, intent it requires is indeterminate.

Determinations as to causation and intent cut against the RCO doctrine the further one goes up the corporate ladder from the individual directly causing the violation of the environmental statute. The corporate officer or installation commander may be in the best position to apply resources and attention to fix environmental problems. That alone may be a

reasonable policy reason to make them responsible and to force them to take precautionary measures to address the dangers of their activity. However, to hold that person responsible when they have no knowledge of wrongdoing is a policy judgment that it is more important to protect the public against environmental risks than it is to hold a potentially innocent person guilty of a crime – an unattractive proposition to most.

As a matter of policy, the application of the RCO doctrine that best factors in the expectations of the public in being protected from such hazards, the responsible party's knowledge of the conduct, and the ability to control the activity seems to be the best methodology for determining criminal culpability.[282] It will be up to the courts, or Congress, to determine how that policy is implemented given the required knowledge elements of the various criminal violations within the environmental statutory regimes. "In such matters, the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted."[283]

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[281] *See* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3rd Cir. 1984); United States v. Dee, 912 F.2d 741, (4th Cir. 1990), *cert. denied.*, 111 S. Ct. 1307 (1991).

[282] *See* Hartman, *supra* note 20.

[283] *Dotterweich*, 320 U.S. at 285.